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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE OF MONTANA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF ARIZONA, CALIFORNIA, COLORADO, FLORIDA, IDAHO, MICHIGAN, NEBRASKA, NEVADA, SOUTH DAKOTA, UTAH, AND WISCONSIN, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTEREST OF THE AMICI CURIAE

Amici curiae are states of the United States, acting through their Attorneys General, that have a strong interest in the treatment of Indian tribes as states (TAS) for purposes of implementing provisions of the Clean Water Act with respect to waters within the exterior boundaries of reservations. Amici curiae are among the states in which approximately 210 tribes have applied for TAS status. (Pet. 135a). In some of the states, such as Wisconsin, EPA has already granted TAS status to tribes; the remainder expect the same will occur as a matter of course when tribes residing within their borders submit applications to EPA.

The amici share with Montana a common interest in ensuring that EPA's approach to conferring TAS status upon tribes is

faithful to the applicable principles of Indian law established by this Court. Despite the varying characteristics of reservations, including such factors as size, treaty history, and demographics, EPA essentially approves tribal applications for state status on a pro forma basis, without regard to a reservation's individual characteristics and without regard to the existence of state water quality regulations that adequately protect health, welfare, and the environment.

The experience in Wisconsin exemplifies the severe problems posed by the pro forma granting of tribal requests for state status under the Clean Water Act. Wisconsin has eleven Indian tribes and bands, each of which has reservation land within the state's borders. The reservations range in size from over 200,000 acres (Menominee) to 1,700 acres

(Sokaogon Chippewa Community) to tiny, scattered parcels recently declared reservations (Ho-Chunk Nation).[1] A map in the appendix to this brief shows the reservation lands in Wisconsin. (Am. 35a).

Four tribes in Wisconsin have sought state status pursuant to section 518(e) of the Clean Water Act, and all four received approval by EPA based upon the assertion that there was water on the reservation that tribal members use--the only showing required under EPA's generous test. Wisconsin challenged each of the four TAS designations in lawsuits in the state's

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[1]For example, in 1986 the Secretary of the Interior proclaimed as reservation lands several parcels owned by the Ho-Chunk Nation, including a 4 1/2-acre parcel on the outskirts of Madison, Wisconsin, and a 2-acre parcel in Jackson County, Wisconsin. 51 Fed. Reg. 41,669, 41,670 (11/18/86); 52 Fed. Reg. 16,461 (5/5/87).

two federal district courts. None of the cases has been decided on its merits.[2]

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[2]During the litigation, two EPA officials alleged that other agency staff members had engaged in misconduct, namely the falsification of key parts of the administrative records. Ensuing discovery revealed compelling evidence that EPA staff had backdated the agency's factual findings in at least three of the four cases, in an apparent effort to bolster the records for appeal. One tribe (Menominee) voluntarily withdrew its TAS application after-the-fact, thereby relinquishing its state status; in the other two, EPA rescinded its decisions granting state status (Lac du Flambeau and Oneida). One of the original four TAS determinations remains pending in district court, awaiting decision on summary judgment. State of Wisconsin v. U.S.E.P.A. and Sokaogon Chippewa Community, Case No. 96-C-90 (E.D. Wis.). In addition, the Oneida Nation of Wisconsin has appealed the dismissal of the lawsuit challenging its receipt of state status. State of Wisconsin v. U.S.E.P.A. and Oneida Nation of Wisconsin, Case No. 96-C-329 (E.D. Wis.), on appeal to the Seventh Circuit Court of Appeals as Case No. 98-2374.

Fallout from this episode also led to the creation of an agency-wide workgroup to review EPA's process for making TAS decisions (Am. 13a-25a). That effort also produced EPA's latest "Montana Test Guidance" (Am. 26a-34a) which is of particular relevance because it shows

(continued...)

The historic reservation of one of the four tribes previously accorded state status, the Oneida Tribe of Indians of Wisconsin, illustrates the serious jurisdictional conflicts that TAS status can engender. The reservation contains approximately 65,000 acres, much of which is urban and suburban in character. In fact, over 4,000 acres of the historic reservation lie within the city limits of Green Bay and comprise approximately 15% of the total land area of that city. At the time it applied for treatment-as-state status, the tribe or its members owned only 13% of the property on this historic reservation--leaving 87% owned by nonmembers. Two towns established in 1908 and 1910 lie entirely within the

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[2](...continued)
EPA's continuing disregard for this Court's decision in Strate v. A-1 Contractors, __ U.S. __, 117 S. Ct. 1404 (1997).

boundaries of the historic reservation; as of 1990 the population of one of the towns was approximately 82% non-Indian and the population of the other was approximately 64% non-Indian.

Not surprisingly, numerous public facilities are located on the historic reservation, including schools, roads, parks and even the Green Bay airport. The various local governments provide such services on the reservation as fire protection, law enforcement, emergency response, public education and social services, and also administer zoning and other ordinances within the historic reservation boundaries. Under EPA's TAS policy, many dischargers, including public as well as private entities, would have to obtain water quality certification from the tribe as a condition of receiving a discharge permit. This could affect activities ranging from general real

estate development to road repairs, and reaches discharges occurring off-reservation, but upstream of the reservation. See Arkansas v. Oklahoma, 503 U.S. 91, 105-06 (1992).

Notwithstanding the obvious "open" nature of the reservation, under Brendale analysis,[3] in determining whether to grant the Oneida Tribe's application for state status, EPA found irrelevant the urbanized character of the reservation, the high degree of nonmember land ownership, and the history of the reservation. Rather, EPA considered only whether there was water on the reservation used by tribal members. (Am. 3a-12a). Nor does EPA consider relevant the size of the reservation area, treating large reservations such as the Flathead Indian

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[3]See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 444-45 (1989)(Stevens, J.).

Reservation the same as very small ones, which can sometimes comprise only a few acres.[4] State status grants tribes essentially a veto power over applications for federal permits under the Act, because certification by the tribe that the proposed discharge would comply with the tribe's water quality standards is a prerequisite for the granting of a permit. (33 U.S.C. §§ 1341 and 1377). If the decision of the court of appeals is affirmed, and the rationale of its opinion is followed in other cases, all residents of Indian reservations--as well as upstream dischargers--will be subject to virtually automatic regulatory control by

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[4]For example, EPA readily granted state status under the Clean Water Act to the Sokaogon Chippewa Community in Wisconsin--whose reservation comprises only 1,700 acres--notwithstanding EPA's avowed policy against "checkerboarding" jurisdiction.

the tribal government in the event the tribe applies to EPA for TAS status.

Compounding the impacts of TAS status, EPA has created a double standard with respect to citizens' rights to obtain judicial review of permitting decisions. EPA formally recognizes that the Clean Water Act requires states to afford adequate judicial review procedures for state regulatory decisions. In fact, EPA recently promulgated a rule specifying that to operate an approved program under section 402 (33 U.S.C. § 1342), a state must provide for adequate judicial review of permit decisions. 40 C.F.R. § 123.30 (1997).

While with one hand EPA acknowledged the critical importance of judicial review to the integrity of state-administered programs, with the other it proceeded to exempt tribes from the same requirement. 40 C.F.R. § 123.30 (1997). This leaves

nonmembers exposed to regulation by tribes, with no right to representation or participation in the tribal government and no right to meaningful judicial review of important regulatory decisions. The amici states have a strong interest in protecting the rights of their citizens, as well as themselves, to meaningful judicial review of regulatory decisions affecting them by preventing unwarranted extension of state status to tribes.

EPA's TAS policies ignore the sovereignty of the states to regulate their own natural resources and citizens in a uniform and consistent manner, as well as the right of citizens to be regulated by government in which they can participate and which they can challenge in court if necessary.

II. REASONS FOR GRANTING THE PETITION

A. THE COURT OF APPEALS' DECISION NULLIFIES STRATE'S LIMITATION ON THE SCOPE OF TRIBAL SOVEREIGNTY OVER NONMEMBERS.

In its effort to promote the assumption of regulatory power by tribes, EPA has lost sight of the established precepts of Indian law, as well as the agency's own pronouncements. In place of careful, fact-intensive historical inquiry into the status of a reservation, EPA has concocted a simplistic, wooden formula under which no tribe could ever fail to receive state status under the Clean Water Act. EPA's approach to the issue of inherent tribal regulatory authority is wholly inconsistent with controlling precedent of this Court, which mandates a presumption against the existence of inherent tribal regulatory authority over

nonmember activities. Montana v. United States, 450 U.S. 544, 565 (1981).

Although Montana recognized an exception for nonmember conduct that threatens tribal health or welfare, this Court last term made clear that to qualify for the exception conduct must threaten "'the right of reservation Indians to make their own laws and be ruled by them.'" Strate v. A-1 Contractors, __ U.S. __, 117 S. Ct. 1404, 1416 (1997), quoting Williams v. Lee, 358 U.S. 217, 220 (1959). The Court found specifically that nonmember conduct that endangers safety, but not tribal self-governance, cannot give rise to a finding of tribal regulatory authority under the second Montana exception because, "if Montana's second exception requires no more, the exception would severely shrink the rule." Strate, 117 S. Ct. at 1415.

Although EPA purports to have based its TAS policy upon the second Montana exception, 56 Fed. Reg. 64,877-88 (1991), the differences between them are irreconcilable. EPA announced when it adopted its rule that its policy would be to apply "generalized finding[s]" as to the importance of water quality to tribal health and welfare to supplement the treatment as state applications of all tribes. 56 Fed. Reg. 64,878 (1991). Under the 1991 policy, if a tribe were to

> make a relatively simple showing of facts that there are waters within the reservation used by the Tribe . . . EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality . . . presume that there has been an adequate showing of tribal jurisdiction . . . unless . . . [a State] demonstrates a lack of jurisdiction on the part of the Tribe.

56 Fed. Reg. 64,879 (1991) (emphasis added).[5] The tribal showing EPA would require under this policy is nominal, at best. Any tribe that uses water from its reservation will be deemed to have regulatory jurisdiction. Contrary to Brendale, the EPA test also erroneously presumes the existence of tribal regulatory authority even in "open" reservation areas that have lost their tribal character due to a substantial transfer of land ownership to nonmembers.

Two weeks after the Court of Appeals issued its decision in this case, EPA issued its "final guidance" on the application of the second Montana exception. (Am. 21a, 26a-34a). Contrary to Strate, EPA nowhere requires a showing

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[5] See also 56 Fed. Reg. at 64,881 (1991): "the Agency presumes that, in general, Tribes are likely to possess the authority to regulate activities affecting water quality on the reservation."

that tribal authority is essential "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." Strate, 117 S. Ct. at 1416 (quoting Montana, 450 U.S. at 564).

EPA has done precisely what Strate forbade by equating the controlled discharge of pollutants, no matter how de minimis, with impairment of tribal self-governance. This approach not only collides with Strate, but would have produced opposite outcomes in South Dakota v. Bourland, 508 U.S. 679 (1993), which found a tribe could not regulate nonmember hunting and fishing activities, as well as in Brendale, which held a tribe could not engage in zoning in an "open" reservation area.

Under EPA policy, states like the amici effectively have the burden of

proving the absence of tribal jurisdiction in order to avoid the loss of authority states would otherwise possess under the Clean Water Act. Not only is this a burden the law does not require states to bear, but as formulated by EPA, the burden is one no state can ever carry.

B. IN ASSESSING THE THREAT NONMEMBER WATER POLLUTION MIGHT PRESENT TO TRIBES, EPA AND THE COURT OF APPEALS ERRONEOUSLY IGNORE THE REGULATION OF SUCH CONDUCT UNDER EXISTING STATE AND LOCAL LAWS.

To support its generalized finding that the possibility of any water pollution rises to the level of a severe threat to a tribe under Montana, EPA erroneously presumes the absence of any existing regulation and enforcement with respect to waters within the exterior boundaries of a reservation. In other words, EPA measures the potential harm to

tribes from nonmember conduct, for purposes of the Montana "second exception," as if the nonmember conduct were not constrained in any way by the states or local governments. That is not the manner in which this Court contemplated applying the test and it does not square with reality.

In Montana itself the Court looked at the effect of existing state regulations on the disputed resource. Montana, 450 U.S. at 566 n.16. The Court did likewise in Brendale, analyzing the impacts upon the tribe of land uses that would be permissible under state and local law. 492 U.S. at 429-30 (White, J.). By evaluating assertions of inherent authority in a vacuum--by assuming that there are no state water quality laws protecting public health when the contrary is true--EPA misapplies the Montana "second exception," and stacks the deck

against the states, to justify approving tribal applications. EPA's approach negates this Court's requirement of demonstrating "necessity" for tribal regulatory jurisdiction: "exercise of tribal power beyond what is necessary to protect tribal self-government . . . is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Montana, 450 U.S. at 564 (emphasis added).

For purposes of the Montana "second exception," a threat must have some basis in reality. It is wholly artificial and unrealistic to ignore, as EPA does, that discharges of pollutants are subject to regulation and enforcement at both the state and federal levels. The real threat to a tribe is not from wholly unregulated pollution, but rather from regulated activities in light of the existing regulations and enforcement by EPA and the

states. As is true for many states, EPA has formally approved Wisconsin's water quality standards under 33 U.S.C. § 1313, finding that the standards adequately protect public health and welfare and the environment. Yet in assessing the threat posed to tribal interests EPA assumes that despite the state's regulatory system there will be such serious degradation of waters that tribal jurisdiction is "necessary" and the Montana second exception is satisfied.

The agency cannot have it both ways. EPA must acknowledge the existing reality of the regulatory mechanisms in place and properly determine who has regulatory authority over the non-Indian lands within a reservation, using the effect on tribal self-governance as the benchmark.

CONCLUSION

EPA's indifference to the factors this Court has established as relevant to determining the presence of inherent tribal authority has tainted its implementation of section 518(e). Because of the substantial impacts of EPA's policy on states, amici curiae respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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July 1998

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

Ms. Deborah Doxtator
Tribal Chair
Oneida Tribe of Indians of Wisconsin
P.O. Box 365
Oneida, Wisconsin 54155

Dear Ms. Doxtator:

It is my pleasure to inform you of my decision to approve the application of the Oneida Tribe of Indians of Wisconsin to administer the water quality standards program pursuant to the Clean Water Act. Section 303.

The Oneida Tribe has satisfied all of the requirements set forth at the Code of Federal Regulations, Title 40, Part 131.8, "Requirements for Indian Tribes to be treated as States for purposes of water quality standards", including demonstrating its authority over all water resources on the reservation.

The Oneida Tribe's water quality standards will be approved under separate cover pending review and concurrence by this office and the United States Fish and Wildlife Service.

If you have any questions or would like additional information, please contact Ms. Claudia Johnson-Schultz at (312) 886-6108.

Sincerely yours,

Valdas V. Adamkus
Regional Administrator

cc: Mr. George Meyer, Secretary,
Wisconsin DNR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO IL 60604-3590

REPLY TO THE ATTENTION OF:

MEMORANDUM

SUBJECT: Authority of the Oneida Tribe of Indians to Regulate the Quality of Reservation Waters

FROM: Marc M. Radell
Associate Regional Counsel

THROUGH: Gail C. Ginsberg
Regional Counsel

To: Valdas V. Adamkus
Regional Administrator

After reviewing the assertion by the Oneida Tribe of Indians of Wisconsin (the "Tribe") of the authority to regulate the quality of Reservation waters and the competing claim of jurisdiction raised by the State of Wisconsin, the Office of Regional Counsel believes that, under the plan established by Congress in the Clean Water Act, the Tribe has the authority to regulate the quality of all water resources within the exterior boundaries of the Oneida Reservation. We therefore recommend that, pursuant to 40 C.F.R. § 131.8(c)(4), you determine that the Tribe has adequately demonstrated that it meets

the jurisdictional requirements of 40 C.F.R. § 131.8(a)(3).

Tribal Authority Under the Clean Water Act. Section 518 of the Clean Water Act, 33 U.S.C. § 1377, sets forth Congress' plan for regulation of water resources within Indian reservations and embodies the Congressional intent that tribes regulate all water resources over which they have authority within the exterior boundaries of reservations. Specifically, Section 518(e) authorizes U.S. EPA to treat an Indian tribe "as a state" for the management and protection of those resources, including assumption of the water quality standards program.

Tribes retain attributes of sovereignty over their members and territory to the extent that such sovereignty has not been withdrawn by federal statute or treaty. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). Accordingly, U.S. EPA assumes that tribes have the authority to regulate the activities of their members that may affect water quality and does not require tribes to submit a showing regarding the potential impacts of the activities of tribal members on the quality of reservation waters.

As explained at 56 Fed. Reg. 64,878 (1991), in evaluating whether a tribe has authority to regulate a particular activity on land owned by non-Indians within a reservation, U.S. EPA examines the tribe's authority in light of evolving case law as reflected in Montana v. United States, 450 U.S. 544 (1981), and Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989). In response to uncertainties in these

decisions regarding the standard of impact on tribal health and welfare that the activities of non-Indians within reservations must have before a tribe can regulate such activities, U.S. EPA applies as an interim operating rule a formulation of the standard that requires a showing that the potential impacts of regulated activities on the tribe are serious and substantial. However, the Agency believes that the activities regulated under the various environmental statutes it administers generally have serious and substantial impacts on human health and welfare. Furthermore, U.S. EPA has already determined that

> because of the mobile nature of pollutants in surface waters and the relatively small size of . . . water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee lands within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are (sic) very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality . . .
>
> Thus, a tribal submission meeting the requirements of § 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the

> reservation used by the Tribe or tribal members . . . . and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets this additional burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction of fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction of the part of the Tribe.

56 Fed. Reg. 64,878, 64,879 (1991).

The Oneida Application. On August 25, 1995, the Oneida Tribe submitted an application to U.S. EPA for "treatment as a state" for the Clean Water Act Section 303 water quality standards program and Section 401 certification program. The application includes a statement from attorneys for the Tribe supporting the Tribe's authority to regulate water quality on all waters within its Reservation. [Attachment 1]. The Tribe asserts that it has authority to regulate water quality pursuant to the Tribe's Constitution and By-Laws.

The cover letter to the Tribe's application and an October 24, 1995,

support document [Attachments 1 and 2] discuss the effects that activities of non-Indians within the Reservation could have on Tribal health and welfare. These documents maintain that

> Members of the Oneida nation make extensive use of the Oneida Reservation's surface waters for fishing, swimming, stock watering, religious ceremonies, and indirectly as a public water supply (through groundwater recharge). In addition, the land ownership of the Oneida Nation is concentrated in the "Duck Creek Corridor" and in other areas adjacent to or containing Reservation waterways. The Oneida Nation thus bears a substantial amount of the impact of surface water pollution on the Reservation.

Letter from Deborah Doxtator to Valdas V. Adamkus, October 23, 1995, pp. 4 and 5.

Clearly, pollution of Reservation waters from any activity would have a serious and substantial impact on the health and welfare of the Tribe and its members within the meaning of U.S. EPA's jurisdictional analysis by exposing to pollutants Tribal members using the waters in any of the many ways described above. The Tribal application and support document also describe specific non-Indian activities that threaten the quality of Reservation waters, such as quarry operations, large scale development, pesticide run-off from a proposed golf-course, and potential dumping by small businesses of various chemicals into waterways and onto the ground. Any such activity subject to regulation under the

Clean Water Act could seriously and substantially affect the quality of Reservation waters and, consequently, the health and welfare of the Tribe and its members.

Wisconsin's Competing Claim of Jurisdiction. On October 2, 1995, the State of Wisconsin raised a competing claim of jurisdiction regarding the application [Attachment 3]. Citing the Brendale decision in support of its position, the State argues that the Tribe lacks authority to regulate water quality in the predominantly non-Indian, or "open", areas of the Reservation. Such areas may constitute almost 85 percent of the Reservation and contain a significant proportion of the Reservation's surface waters. Wisconsin also asserts that a minority opinion in the Brendale case requires that, before the Oneida Tribe can exercise jurisdiction over non-Indian activities, the Tribe must demonstrate that existing State standards do not adequately protect Tribal interests.

The Office of Regional Counsel does not believe that either of the State's arguments demonstrate a lack of Tribal jurisdiction over non-Indian activities within the Reservation. In analyzing jurisdictional issues in light of the Montana and Brendale decisions, U.S. EPA looks to the potential effects of non-Indian activities on Tribal health and welfare, not to the open or "closed" (predominantly Indian) character of the area. In the Brendale case, only two justices found the open or closed nature of the location of the non-Indian activity dispositive of the jurisdictional issue. The other justices applied the Montana

test. The four justices who found that the Yakima Indian Nation did not meet the Montana test based their opinion on a District Court finding that the non-Indian activity at issue would have no direct effect on the Tribe and would not threaten the Tribe's political integrity, economic security or health or welfare. The three justices who found that the Yakima Indian Nation did meet the Montana test based their opinion on their own finding that the non-Indian activity at issue would have a direct effect on the Tribe's political integrity, economic security or health or welfare. In this case, the Oneida Tribe has demonstrated that the relevant activities of non-Indians, even in open areas of the Reservation, present a serious and substantial threat to the quality of Reservation waters and, thence, to Tribal health and welfare.

Neither can we agree with the State of Wisconsin that the dicta of a two-justice opinion in Brendale establishes a requirement that, before the Tribe can regulate non-Indian activities within the Reservation, the Oneida Tribe must demonstrate that Wisconsin's water quality standards do not adequately protect Tribal health and welfare. Even if such a test did exist, the Oneida application identifies at least two Tribal uses of surface water, for religious ceremonies and as indirect public drinking water supply, not recognized by the State in its water quality program. The Wisconsin water quality standards likely do not protect uses not considered in their development.

Wisconsin Governor Tommy G. Thompson appears to raise an additional objection

to approval of the Oneida application by letter of December 20, 1995 [Attachment 4]. In that letter, he refers to the Wisconsin Public Trust Doctrine as requiring the State to hold the waters of the State in trust for all its citizens and as giving rise to his State's commitment to water quality. The State has presented a similar objection to program applications submitted to U.S. EPA by other Tribes, i.e., that because the State holds titles to the beds of navigable waters within the Reservation pursuant to the federal common law "equal footing" doctrine, the State has the duty and authority to regulate water quality within the Reservation pursuant to the Wisconsin common law "public trust" doctrine.

The equal footing doctrine provides that lands underlying navigable waters in territory acquired by the United States are held in trust for future states and that title to the submerged lands vests automatically in a state upon its admission to the Union. Shively v. Bowlby, 152 U.S. 2 (1894). Pursuant to this doctrine, the State gained ownership of lake beds within its borders when it achieved statehood in 1848. Wisconsin v. Baker, 698 F.2d 1323, 1327 (7th Cir. 1983).[1] In addition, Wisconsin courts have construed Article IX, Section 1 of the Wisconsin Constitution, which provides that the navigable waters leading into the

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[1] Neither the State nor the Tribe specifically addresses whether, upon its 1848 admission to Union, the State assumed title to the beds of waters within the Oneida Reservation, created in 1838.

Mississippi and St. Lawrence Rivers shall be common highways and "forever free", to mean that the State holds the beds of Wisconsin's navigable waters in trust for all of its citizens. State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983). State courts have interpreted the public trust doctrine as creating affirmative obligations on the State to protect and preserve its waters for fishing, hunting, recreation and scenic beauty, including at least some regulation of water quality. Wisconsin's Environmental Decade v. D.N.R., 271 N.W.2d 69 (Wis. 1978).

U.S. EPA need not conclusively answer the questions of whether the State retains title to the beds of navigable waters within the Oneida Reservation and the extent of any State jurisdiction arising from such ownership. Even if the State does hold title to water beds within the Reservation, U.S. EPA could properly conclude that the Tribe has adequate civil regulatory authority over water resources on the Reservation to establish water quality standards under Section 303 of the Clean Water Act. As discussed above, the Oneida Tribe has regulatory authority over all members of the Tribe and has demonstrated authority over the activities of non-members of non-Tribal lands within the Reservation for the purposes of establishing water quality standards. This demonstration of authority over the activities of non-members extends to activities on any non-Tribal lands within the Reservation, even water beds, because any such activities that impair water quality would likely have a serious and substantial effect on the health and welfare of the Tribe. Thus, the Tribe possesses inherent authority over all

persons on the Reservation who may engage in activities that might affect the quality of Reservation waters, regardless of whether or not the State retains title to the water beds.

Conclusion. Based upon the showing by the Oneida Tribe that all the waters within the Reservation are used by the Tribe and the assertion by the Tribe that impairment of such waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the Tribe, we determine that the Tribe has made an adequate showing of jurisdiction over non-Indian activities within the Reservation for purposes of water quality standards and certification program authorizations. We also conclude that no other governmental authority has demonstrated a lack of jurisdiction on the part of the Tribe.

We therefore recommend that, pursuant to 40 C.F.R. § 131.8(c)(4), you determine that the Oneida Tribe has adequately demonstrated that it meets the jurisdictional requirements of 40 C.F.R. § 131.8(a)(3) for regulation of all water resources within the Reservation under the water quality standards and certification programs.

Attachments

cc: Jo Lynn Traub

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

SUBJECT: Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations

FROM: Robert Perciasepe
Assistant Administrator for the National Indian Program

Jonathan Z. Cannon
General Counsel

TO: Assistant Administrators
Regional Administrators

In a memorandum dated July 9, 1997, we established an Agency-wide workgroup to review EPA's process for making determinations on tribal applications for EPA-approved regulatory programs. That memorandum noted that "it is vital that the Agency have a clear, well-documented process to assemble and review relevant information, and decide on tribal program applications, in order to assure that the Agency makes sound decisions that can be defended successfully." The Workgroup's charge was to review the Agency's current process for making such determinations and develop recommendations, which might lead to written guidance, for improving the process to ensure reliably defensible decisions.

The Workgroup submitted its recommendations on December 23, 1997.

Before making its final recommendations, the Workgroup shared its preliminary recommendations with the Tribal Caucus of the Tribal Operations Committee (the TOC), individual tribes, and EPA offices for their review and comment. The Workgroup's final recommendations have been shared with the EPA senior managers for the Indian Program for their views.

We too have reviewed the recommendations, and considered the comments received regarding the recommendations from within the Agency and from tribes. By this memo, we accept in full the recommendations made by the Workgroup. Below we provide: 1) a summary of the Workgroup process; and 2) a description of the recommendations and a discussion of how each recommendation will be implemented.

When we initiated the review that led to these recommendations, we asked that Regions generally defer making final determinations on tribal applications for regulatory authority until the review was completed. Now that the review is completed, we request that the "Regions resume decision-making on tribal applications in accordance with the recommendations and guidance adopted today.

The Workgroup Process

The Workgroup, which was chaired by Robert G. Dreher, Deputy General Counsel, included representatives from all EPA Regions, and a number of headquarters (HQ) offices. The Workgroup developed a list of five issues to be addressed and established issue subgroups to prepare

options papers on each issue. A list of Workgroup and Subgroup members is attached as Attachment A. The five issues identified and addressed by the Workgroup were: 1) the process for maintaining and compiling administrative records for EPA determinations on tribal eligibility to run regulatory programs; 2) the appropriate consultation and concurrence role for HQ in these decisions; 3) the application of the Montana test for evaluating tribal authority over non-Indians on fee lands within reservations; 4) opportunities for stakeholder involvement on EPA decisions regarding tribal applications for eligibility to establish water quality standards under the Clean Water Act; and 5) evaluation of treatment in the same manner as state (TAS) criteria for grants.[2]

The Workgroup arrived at preliminary recommendations by the middle of October. Workgroup members solicited comments on the options and preliminary recommendations from their respective offices. Then, at the beginning of November, the Workgroup solicited comments on the options and preliminary recommendations from the Tribal Caucus of the TOC and from individual tribes. The Workgroup also provided periodic updates on its progress during the TOC's monthly conference calls.

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[2]The Workgroup also identified one longer-term issue - - the tribal role under FIFRA - - that the Workgroup recommends that Agency evaluate in the future.

The Workgroup considered comments from the TOC, individual tribes, and EPA offices. The Workgroup made several changes to the preliminary recommendations to address these comments. Finally, the Workgroup provided its recommendations to us, along with a discussion of the key considerations, comments received, and options evaluated for each issue.

Adoption and Implementation of the Workgroup Recommendations

The primary considerations of the Workgroup were to develop recommendations that will: 1) improve the consistency and legal defensibility of EPA decisions regarding tribal programs; 2) avoid burdensome procedural requirements that may unnessarily delay decisions on tribal applications; and 3) recognize the importance to tribes and EPA's Indian Program of decisions involving tribal sovereignty. The principal concerns raised by the TOC, tribes, and Regions in their comments on the preliminary recommendations were that the Agency avoid adopting procedures that will place undue burdens and delays on EPA's process for making decisions on tribal applications. The Workgroup considered and made several changes to the preliminary recommendations to address these concerns. We believe that the recommendations adopted below achieve the Workgroup's goal of significantly improving the defensibility of EPA's decisions without placing undue burdens on the decision-making process for tribal applications. To the extent the recommendations place additional burdens on the process, we believe they are warranted in order to ensure that the

Agency handles decisions pertaining to tribal sovereignty with the utmost care.

Issue 1 - - Administrative Records: Improving EPA's process for maintaining and compiling administrative records on EPA decisions regarding tribal eligibility to run regulatory programs.

Workgroup Recommendations: The Assistant Administrator (AA) for Water (as the AA for the National American Indian Program) and the Office of General Counsel (OGC) should jointly issue a memorandum providing guidance and establishing docketing procedures specific to the compilation and maintenance of administrative records for EPA determinations on tribal applications for eligibility to run regulatory programs under all relevant EPA statutes. The memorandum should also ask Regions to establish a training program to ensure that the guidance and procedures are followed.

Adoption and Implementation: We adopt this recommendation in full. The final guidance is attached as Attachment B.

Issue 2 - - HQ Role: "What concurrence/consultation role should HQ play in EPA decisions regarding tribal eligibility to run regulatory programs?

Workgroup Recommendation: HQ review and concurrence should be required for all nationally-significant matters. Decisions on national significance should be guided by semi-annual review and consultation meetings between HQ offices (the American Indian Environmental Office (AIEO), OGC,

and the national program manager (NPM offices) and Regions to discuss national concerns/issues and to provide Regions the opportunity to discuss potential upcoming tribal actions/cases.[3] In all cases, regional-HQ consultation should begin as early as possible, particularly prior to a tribe's application where regional staff believe, based on early involvement with the tribe, that nationally-significant issues may be raised by an application. In addition, to help inform decisions on national significance, Regions should be asked to provide a brief memorandum to HQ assessing the national significance of each tribal application for a regulatory program as applications come into the Region. HQ should be ultimately responsible for determining national significance.

The determination regarding national significance should be made within 30 days of EPA receipt of a tribal application. On applications with nationally-

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[3]The Workgroup recommended that there be one meeting involving all Regions and one Region-specific meeting each year. In addition, the Workgroup recommended that existing procedures (e.g., the National Indian Workgroup) be used to improve coordination. Although the scope of the Workgroup's analysis was limited to EPA determinations on tribal eligibility applications for regulatory programs, the Workgroup noted that other pending or possible future Agency actions affecting environmental programs in Indian county (e.g., PSD redesignations, site-specific rulemaking under RCRA) can and should be discussed in these semi-annual meetings.

significant issues, an expectation should be established that HQ will concur or provide specific guidance to the Region within 30 days after a Region's tentative decision has been provided to HQ, provided there has been early involvement for HQ. Regions should ensure that a tribe that has applied for eligibility is kept informed of the status of the decision-making process. The process described above should be reevaluated after 3 years.

AIEO, OGC and the relevant national program office are the appropriate HQ offices to be involved in the consultation and concurrence process.

Finally, Regions should have periodic "Round table" discussions with their tribes. Regional Counsel attorneys should have early consultation with tribal attorneys to identify potential legal issues pertaining to tribal eligibility for regulatory programs.

Adoption and Implementation: We adopt this recommendation in full. Appropriate changes to the Agency's delegations manual will need to be made to implement the HQ concurrence aspects of this recommendation. Bob Perciasepe is initiating appropriate delegations manual changes for office of Water programs. We have asked the Assistant Administrators for the Office of Prevention, Pesticides, and Toxic Substances and the Office of Air and Radiation to initiate appropriate changes to the delegations manual for their programs. We ask that AIEO consult with those offices and report to us on the status of these delegations manual changes in one month. We ask that regional and HQ

offices implement all other aspects of the recommendations outlined above.

We emphasize that the consultation and concurrence process should operate as efficiently as possible. It is essential that HQ and Regions consult early in the process, even before tribal applications are submitted whenever possible. We will reevaluate this process, with input from Regions, NPMs, AIEO and tribes, after three years.

Issue 3 - - Application of the Montana test.

Issue 3a - - Should EPA prepare guidance on applying the Montana impacts test (regarding tribal authority over nonmembers on fee lands within reservations)?

Workgroup Recommendation: The AA for Water, (as the AA for the National American Indian Program) and OGC should jointly issue general guidance to EPA regional staff, and request that AIEO work with OGC and the Regions to develop and initiate a training program to supplement the guidance. The training should be conducted in Regions with nonmember fee lands and should allow for discussion of the application of the Montana test and the development of decision documents. Such training should be required for all persons developing decision documents that include an analysis under the Montana test. For all other persons involved in the Indian Program, the training should be encouraged. Finally, Regions should be ready to work with tribes that request assistance in preparing applications involving Montana test issues.

Adoption and Implementation: We adopt this recommendation in full. The final guidance is attached as Attachment C. We ask that AIEO work with OGC and the Regions to develop a training program as discussed above.

Issue 3b - - Generalized Findings. Should EPA publish a set of generalized findings, to supplement reservation-specific findings, regarding the nature of the pollutants and activities regulated under the environmental statutes and the importance of effective regulation under those statutes?

Recommendation: the Agency should issue in the Federal Register an appropriate set of generalized findings for all relevant programs regarding the seriousness and mobility of pollutants and the importance of environmental regulation to tribal self-governance.

Adoption and Implementation: We adopt this recommendation in full and ask that AIEO and the relevant NPMs in the Office of Water and the Office of Prevention, Pesticides, and Toxic Substances, in consultation with OGC and the Regions, prepare in a timely manner appropriate generalized findings consistent with the Workgroup's recommendation.

Issue 4 - - Stakeholder Involvement: Who are the appropriate entities to comment on tribal water quality standards (WQS) eligibility applications? Should opportunity for comment be provided on supplemental application materials or tentative determinations? This issue is

limited to opportunity for comment on a tribe's assertion of jurisdiction.

Recommendation: The current process for review of tribal eligibility to set WQS provides "appropriate governmental entities" (i.e., adjacent states, tribes, and federal agencies) an opportunity to comment on tribal assertions of jurisdiction contained in the initial application from a tribe. In addition, under the current process, notice of availability of a tribal application is provided to other potential commenters, specifying that any comments are to be funneled through "appropriate governmental entities." The Workgroup recommends that EPA supplement this current process by also providing: 1) supplemental application materials to "appropriate governmental entities," 2) a 30-day opportunity for these governments to comment on EPA's proposed findings of fact (under the Montana test) where a tribe seeks program approval over nonmembers on fee lands, and 3) notice of availability of such proposed findings of fact to other potential commenters (with comments to go through "appropriate governmental entities"). The Agency should also ensure that applicant tribes have an opportunity to review EPA's draft proposed findings of fact (under the Montana test) before they are made available to "appropriate governmental entities." EPA should also provide tribes an opportunity to respond to any comments submitted by "appropriate governmental entities."

In addition, EPA should ensure that tribes are given an opportunity to comment on any state application to EPA containing

an assertion of jurisdiction over areas that are in or adjacent to Indian country.

Adoption and Implementation: We adopt this recommendation in full. EPA decisions regarding tribal eligibility to set WQS should proceed consistent with the process detailed above. This expanded process may be implemented without changes to EPA regulations (see 40 C.F.R. § 131.8). Nonetheless, the Office of Science and Technology within the Office of Water, in consultation with AIEO, the Regions and OGC, should explore whether it is advisable for the Agency to incorporate this expanded process into regulation.

Issue 5 - - Eligibility requirements for grants: Ensuring consistent and adequate documentation regarding tribal eligibility for grants (i.e., evaluation of "treatment in the same manner as a state" (TAS) criteria - federal recognition, substantial duties, jurisdiction, and capability).

Recommendation: EPA should prepare guidance for EPA staff on the TAS considerations unique to grants. The guidance should address issues such as: the jurisdictional component of grant eligibility decisions; tribal authority issues relating to CWA § 319(h) grants; the "reservation" requirement under the CWA; use of CWA § 106 funds for off-reservation activities that relate to the protection of waters within reservations; the capability component of grant eligibility decisions; procedures for documenting eligibility determinations for grants; and internal Agency concurrences required for grant eligibility decisions. The Agency should ensure that appropriate

grant and program offices receive copies of the guidance.

Adoption and Implementation: We adopt this recommendation in full and ask that AIEO and the Office of Administration and Resources Management, in consultation with OGC and the Regions, prepare in a timely manner guidance consistent with the Workgroup's recommendation.

Conclusion

We would like to thank all the members of the Workgroup for dedicating so much of their time and energy to reviewing the Agency's process for making tribal eligibility determinations and developing the recommendations and the guidance for improving this process. Also, we would like to thank the Tribal Caucus of the TOC for taking the time to review thoroughly the draft recommendations and for providing the Workgroup with detailed comments. We believe that the recommended changes in the Agency's process, the proposed training programs, and the new guidance will improve the Agency's decision-making process for tribal applications for eligibility to run regulatory programs.

If you have any questions regarding this memorandum, please contact Robert Dreher (202-260-8064) or have your staff contact Tony Hanson (202-260-8106) or Jim Havard (202-260-1003).

Attachments

cc: Senior Indian Managers
Associate General Counsels

Regional Counsels
Tribal Eligibility Workgroup Members
National Indian Workgroup Members
EPA Indian Law Workgroup Members

ATTACHMENT C

MONTANA-TEST GUIDANCE

Making Factual Determinations Under the Montana Test: Tribal Civil Regulatory Authority Over Nonmember Activities on Fee Lands

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NOTICE

The following guidance is intended only for EPA managers and staff in the analysis of tribal assertions of civil regulatory jurisdiction over nonmember activities on fee lands within a tribe's reservation. Specifically, the guidance is intended to assist in the collection and analysis of factual information related to the question of whether or not the activities of nonmembers on reservation fee lands may have serious and substantial effects on the "political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981). Because of the importance of EPA's determinations in this area, it is very important that all readily-obtainable factual information be available to EPA managers in order to make properly-informed decisions.

The following guidance should be viewed as offering suggestions only. The guidance is based upon the experience of the Agency to date and offers suggestions on questions to ask and various types of information

> that, if available, may be helpful to the Agency in making jurisdictional determinations. The guidance does not establish any requirements. In particular, it does not establish any requirement that any specific information or category of information listed here is necessary in order to determine that nonmember activities either do or do not have the impacts on the tribe necessary to warrant tribal regulation of those activities. The determination of the sufficiency of information is a matter of the expert and professional judgment of the decision-maker based on the facts of the particular application, and cannot be reduced to guidance of this nature.

Background

In their applications for eligibility to implement a number of EPA programs, tribes must demonstrate that they have sufficient jurisdiction to enforce tribal laws over the areas covered in the application, including, where appropriate, civil regulatory jurisdiction over nonmember activities that may occur on any nonmember-owned fee lands located on a tribe's reservation. The Supreme Court has set forth a legal test for determining whether a tribe has set forth a legal test for determining whether a tribe has jurisdiction over nonmember activities on fee lands, called the "Montana Test."

> The Montana Test establishes that a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when

> that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981).

In 1991, EPA decided that it would apply a more rigorous formulation of the Montana Test by establishing an "operating rule" that requires tribes seeking eligibility to set water quality standards governing the activities of nonmembers on fee lands to show that the effects are "serious and substantial."[4] At the same time, EPA published its finding that the behaviors regulated under the Clean Water Act (CWA) tend to have serious and substantial effects on human health and welfare (and, thus, the CWA regulates them). EPA also announced that it would require tribes seeking eligibility to set

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[4] EPA noted in 1991 that "[t]he choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se." Since 1991, however, the Supreme Court has reaffirmed Montana's impacts test in 1993 (Bourland) and again in 1997 (Strate), both times quoting the Montana impacts test verbatim without addressing the need for "serious" or "substantial" impacts. While it appears that the Montana Test does not require "serious and substantial" impacts, for the time being, as a matter of prudence, EPA will continue to look to see whether such impacts exist when evaluating tribal authority under the Montana Test.

water quality standards governing the activities of nonmembers on fee lands to provide facts, on a case-by-case basis, demonstrating that water pollution from nonmember fee land sources has or may have serious and substantial effects on the health or welfare of tribal members under the particular conditions of the tribe's reservation.

The Agency now has several years of experience in reviewing tribal applications for EPA problems that involve an assertion of tribal jurisdiction over nonmember activities on fee lands. The Agency's experience shows that it is important for the Agency to be consistent in its application of the Montana Test. To help ensure national consistency in the Agency's process for making determinations under the Montana Test, the following factors should be considered.

Guidance

What types or categories of facts may be relevant to a determination of whether pollution generated on nonmember fee lands may have a deleterious effect on tribal health or welfare or the tribe's political integrity or economic security? The following questions should be considered:

(1) Is pollution being produced on nonmember fee lands, or may it be/is it likely to be produced? Are there facts showing that pollution is presently being produced on nonmember fee lands within the reservation? If no pollution is

presently being produced, are there circumstances showing that new pollution sources may be established in the future that may have impacts on tribal health, welfare, political integrity, or economic security? The threat of such impacts is a reasonable basis for a tribal government to establish controls intended to prevent harm from occurring in the first place. Thus, any information regarding present or potential pollution sources on nonmember fee lands should be considered.

(2) Are tribal members or resources exposed, or may they be/are they likely to be exposed to the pollution? Are there facts showing, not only that pollution is occurring or may occur, but that tribal members may be exposed to the pollution? For example, such exposure can occur if pollution is carried from nonmember lands due to the ambient nature of air and water. Tribal members may be exposed to the pollution when they are on nonmember fee lands. Pollution can also be carried through the food chain or drinking water supplies. Any facts relating to the means by which tribal members are or might be exposed to pollution should be considered. Are there facts showing that resources upon which tribal members depend (e.g., air, water, plants and

animals) are or may be exposed to pollution?

(3) Does the exposure to the pollutants affect or have the potential to affect tribal politics, economics, health or welfare? Are there facts or studies supporting a showing that, if exposed to the pollutants generated on nonmember fee lands, tribal members may suffer deleterious effects on their "political integrity, economic security or health or welfare?" Effects on "political integrity" and "economic security" may occur when tribal members, or species or resources on which tribal members depend, are exposed. For example, the tribe may depend economically upon the consumption or commercial sale of fish, and protection of the fish resource depends upon effective protection of the resource habitat. Are the impacts to tribal members serious and substantial?

B. Do the facts relating to a Montana Test analysis differ from program to program or under different environmental statutes? Yes. Again, the purpose of this guidance is simply to suggest questions to ask and possible areas to investigate to ensure that as many of the relevant facts are before the EPA decision-maker as are reasonably available. The types of pollutants may vary from program to program. Similarly, the

route of exposure often may vary from program to program.

C. How detailed should the Montana Test analysis be? Any factual data readily available to the tribes, EPA and any other commenters, such as state or local governments, businesses and private citizens, might be considered. One approach would be to use the information provided in the tribal application, and information provided by external commenters and by an EPA review of the literature and relevant information in Agency files. In order to base Montana-Test decisions on as much relevant information as is reasonably available, Agency staff should do the best job that can reasonably be done in thoroughly substantiating their recommendations with available facts and studies. A "best reasonable effort" would not ordinarily require EPA Regions to carry out or contract for original research.

D. Should Montana-Test determinations address how regulation of nonmember water-polluting activities is necessary to effective tribal "self-governance?" This issue arises as a result of a discussion of impacts on self-government by the Supreme Court in it's 1997 decision in Strate v. A-1 Contractors. The Agency determined in its 1984 EPA Indian Policy that "the principle of Indian self-government" appropriately includes such governmental functions as "setting standards, making environmental policy decisions

and . . . carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace." The tribal governments' views on this issue are particularly important. It will greatly assist the Agency in making Montana-Test determinations if the applicant tribal government would also give its reasoning and basis (including any supporting facts) for concluding that effective self-government includes enabling the tribe to carry out the program for which it is applying.

E. Should EPA consider a tribe's treaty rights or other similar rights embodied in statutes or executive orders in making its determinations? The applicant tribe may have signed a treaty with the United States in which the United States has guaranteed rights that are clearly tied to tribal politics, economics, health or welfare. While this information does not in and of itself demonstrate that nonmember activities may impact the tribal interests recognized in the Montana Test, it may be relevant to the analysis of whether there are impacts that are serious and substantial and a threat to effective self-government.

F. At what point should Regional management and staff seek input and advice from Headquarters in making Montana Test determinations? National Program Offices, the Office of General Counsel and the American Indian Environmental Office can all

provide important assistance and advice, based upon the Agency's experience in addressing the issues encountered in evaluating tribal assertions of civil regulatory authority over nonmember activities. This body of Agency experience is constantly growing, and informed by new federal court decisions applying the Montana Test. In order to benefit from the most current and relevant information, Regions should coordinate closely with Headquarters' offices and seek Headquarters concurrence on applications raising nationally-significant issues. This coordination should begin as early in the process as possible, such as upon notice that a tribe is interested in pursuing regulatory authority over nonmembers on fee lands, and no later than when individual tribal applications are received in the Regional Office.

INDIAN RESERVATIONS IN WISCONSIN

Source: DNR-AM 9/10/96